Judicial Reasoning and Social Change

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INTRODUCTION

Some people are beginning to doubt that courts are doing well in responding to recent social problems. I doubt it myself. Part of the problem may lie in the way the courts—and through the courts, lawyers generally—have conceived of the proper nature of judicial reasoning. There is a great deal about our court system, including its habitual process of reasoning and argumentation, that is worth preserving; but change may be in order.

The objective of this article is to investigate ways in which such change may be realized. The method of approach to the subject matter is somewhat unorthodox in appearance but can be seen as similar to any search for what Professor Wechsler has termed "neutral principles."[1] The particular unorthodoxy of this article lies in the attempt to examine what are now problems in the courts without the habitual use of the relevant legal terminology. The reader is therefore requested to temporarily refrain from interjecting what may seem to be relevant legal concepts and doctrine so that any initial dissonance which may be felt does not cause rejection of the discussion solely because of the approach.

RULES AND SKILL

Formulated rules, principles, and statutes are said to govern a case in court,[2] and these commanding communications addressed to judges[3] theoretically guide and control the decisionmaking process. Rules whether derived from precedent or statute obviously constitute a real and important factor in judicial thinking and are the basic tools used. They just as obviously do not turn adjudication into a mechanical process since human thought is always necessary for their formulation, interpretation, and application. Statutes are, of necessity, general statements of law which must be interpreted and applied to specific fact

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[1] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[2] Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 861 (1931).

[3] *See* Cullison, *Logical Analysis of Legal Doctrine: The Normative Structure of Positive Law*, 53 IOWA L. REV. 1209, 1210 (1968).

situations. For the application of a precedent or line of precedents, the court must first discover the correct rule of decision from opinions which may logically contain any number of rules as well as dicta.[4] Thus, a court is never merely stating what the law is, but, necessarily, is deciding to some extent what the law ought to be.[5]

Mechanical use of rules, if possible, is suited only to a society which is relatively homogeneous and unchanging,[6] or in which the political and social system disregards what the people want as long as they are controllable. The main attraction of rules, and their use in law, come from the advantages objective formulation offers to society. Forced judicial adherence to rules in decisionmaking, for example, restricts the discretion of judges who are, in the federal and some state systems, divorced from popular political controls. Rules, although often imprecise, are subjected to the scrutiny of the legal profession which is trained to interpret their meaning and possible application in different fact situations. This, in turn, promotes a high degree of social and political stability since there is less ambiguity as to what constitutes permissible or required behavior.

The obvious difficulty with adherence to "objective" standards is that it admits of no comprehensive and objective rule or method for changing law. This lack of flexibility is, in fact, one of the vital weaknesses of objective law. It is, however, just as obvious that courts do constantly change law either openly or covertly. Through a process described as synthesis and resynthesis,[7] they formulate new rules or reformulate old ones by lifting general language from a precedent and applying it differently, restricting the precedent's rule to its facts, or simply overruling prior cases. There is, however, *intersubjective* control

[4] Rules are not simply the summary of decisions, but when formulated provide a means of understanding them. *See* Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1316–19 (1969).

[5] Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958); McCoy, *Logic vs. Value Judgment in Legal and Ethical Thought*, 23 VAND. L. REV. 1277, 1286 (1970).

[6] The highly formal images suggested by an extreme positivist approach to law are descriptive of a static political universe in which human inconsistency and the variability of social conditions play a relatively insignificant part. *Cf.* Shubert, *Behavioral Jurisprudence*, 2 LAW & SOC. REV. 407, 410–11 (1968).

[7] What may be called the Levi method of legal reasoning describes a process of "moving classification." Law is said to consist of rules, however imprecise, derived from precedents and statutes, and new rules must encompass the relevant statutes, the overruled prior cases, and the new case. Any prior case which does not fit into this single rule must be overruled. *See generally* H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); Levi, *The Nature of Judicial Reasoning*, 32 U. CHI. L. REV. 395, 398–403 (1965). *See also* K. LLEWELLYN, THE BRAMBLE BUSH 56–59 (1951), *discussed in* Christie, *supra* note 4, at 1318–19.

of this process in that judges are trained in a specific mode with known and visible techniques, and are guided by the goal of common sense.[8] Thus, any subjective discretion will always be controlled by a judge's "knowledge of the whole body of law and the interdependence of its parts" which he cannot eliminate "even if he wishes."[9] Training and experience is reflected also by the fact that if a judge does deviate, there is little chance that he can influence others to follow him.[10]

Knowledge of the legal skill or art does not provide effective criteria for controlling change, and even though judges may be guided by common sense or logic, they are not ruled by it.[11] Common sense does not tell a judge how far he should range in accumulating reasons for or against a particular proposition, which reasons he must consider or disregard, or how he should weigh the reasons presented. He may, in some instances, react intuitively or emotionally to a case and thereafter construct a logical set of legal propositions which played no part in his decision but which justify his subjective conclusion.[12] The concept of logic is of little assistance since it essentially focuses on the "sequential" form of analysis rather than its content; this means that it is concerned solely with the validity of an inference from facts and assumptions that are assumed to be valid, and is independent of questions of observable reality.[13] Thus it is not unlikely that both sides of a case may be supported by faultless logic.[14]

Acknowledging that subjective human thought processes play an important part in judicial decisionmaking, and assuming that the existing professional intersubjective agreements do not provide a satisfactory illumination of rule changing,[15] we cannot hope to know how decisions

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[8] *See* Christie, *supra* note 4, at 1321.

[9] J. FRANK, LAW AND THE MODERN MIND 283 (1930).

[10] *See id.* at 282–84.

[11] *See* Cullison, *supra* note 3, at 1267. The "law" that finds expression in court decisions includes essentially only what the deciding judges choose to follow. Halper, *Logic in Judicial Reasoning,* 44 IND. L.J. 33, 38 (1968).

[12] *See* J. FRANK, *supra* note 9, at 281–84. An easing of this charge is that the long training and experience of the judge permits him to see the picture before he can fill in the details. His subsequent consideration may well include an evaluation of the initial reaction through reasoned analysis. *See* Sinclair, *Legal Reasoning: In Search of an Adequate Theory of Argumentation,* 59 CALIF. L. REV. 821, 826 (1971). A realist argument is that the stated rules of law conceal, more than explain, the bases of judicial decision, and this concealment may be complicated by the conception of law as a symmetrical structure of logical propositions. Under this concept truth or error may be implicitly decided by whether a decision fits into the structure. *See* Gilmore, *Legal Realism: Its Cause and Cure,* 70 YALE L.J. 1037, 1038 (1961).

[13] Halper, *supra* note 11, at 39.

[14] *See generally* J. FRANK, *supra* note 9, at 281.

[15] *See generally* Gilmore, *supra* note 12. The author argues that the loosening of the problems caused by stare decisis will come about through a movement toward the use of

are made until we understand the guiding motivations of judges in their professional behavior.

FACTORS INFLUENCING DECISIONMAKING AND CHANGE

Attitudes

An individual's analytical thought is based upon his general philosophy of life or his central values. Even though judges as a group would accept certain common values, such as freedom and equality, different judges may hold to various orderings of priorities among these values.[16] A "conservative" judge may place individual freedom in a higher status within his scale of accepted values, and this ordering will be determinative of his attitude formation. In turn, these attitudes will affect the way in which he identifies with differing legal positions. An argument which is perceived as upholding this higher value will usually be better received than one which emphasizes equality at the expense of individual freedoms.[17]

This judge will also have a whole structure of attitudes reinforcing this value scale. Included in this scheme will be attitudes which represent the judge's ideas on substantive and procedural matters, as well as those relating to the judicial and governmental structure. An entire structure of attitudes is thereby formed which arises from the initial value choice and extends even to decisions on more routine judicial activities. This structure will also include defensive attitudes which allow rejection of arguments which seriously question the validity of the judge's mental order. These may include what we call biases or prejudices which allow the judge to avoid matters which cannot be assimilated into his scheme of attitudes. These may allow him to see any threatening argument as "irrational" or "nonsensical" and thereby avoid the need for examination of his own prejudgments. The whole struc-

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more general principles, statutory policies, and codified standards as decisionmaking guides. If this is truly a prophetic statement, such a trend would intensify the need for understanding human decisionmaking behavior since these processes would become more important in relation to the generality of the objective standards.

[16] *See generally* D. BEM, BELIEFS, ATTITUDES, AND HUMAN AFFAIRS 4–13 (1970).

[17] *Id.*

An attitude is defined as the nonconscious predisposition of an individual to evaluate some thing or person in a favorable or unfavorable manner. A belief is an extension of an attitude on the conscious level. The relationship of attitudes and beliefs is dialectic in that conclusions consciously arrived at are affected by nonconscious predispositions and, in turn, affect and modify the predispositions. An attitude remains more stable because of its generality and its nonconscious state while beliefs are more vulnerable to change because of their habitual clash with contradictions. D. Grimland, Mainstreams of Attitude Research 1945–1965, Aug. 1967, at 3 (unpublished M.A. thesis in the University of Texas at Austin Library).

ture of attitudes provides a means for reaching the judge's preconceived goals and for avoiding what may be implicitly thought of as bad or punishable activity.

Attitudes as to what constitutes punishable activity are often comparable to conditioned responses.[18] People are simply conditioned throughout their lives to react in certain ways to various words, ideas, or actions. An example is the reaction to "indecent" or "obscene" matter. A person is taught through early punishment or equivalent experience that "obscene" words or acts are "bad" and will bring pain or deprivation of reward.[19] A judge who has not been exposed to any influence which retards the force of this teaching will react with abhorrence to "obscene" material or activities. His immediate response will be toward punishing the actor involved because he knows that such people are to be treated in this way. The severity of his response may also be related to the situation; that is, the expression of such words in more punishable circumstances (*i.e.*, before a mixed audience) intensifies his abhorrence.[20]

This reaction is not rationally connected to the information, idea, or concept behind the expression, but is related primarily to the judge's conditioning as to the act of expression itself. In essence, conditioning of this sort determines the way in which human beings make conscious decisions whether they realize it or not. The basis for a conclusion that obscenity is bad may be unknown,[21] but nevertheless this conclusion significantly affects the way in which people behave and order their lives. Whether conclusions arrived at in this manner are labeled "value judgments," or not, is of little importance; the point is that individuals do act, order their lives, and order the lives of others on such a basis.[22]

Accordingly, a simple admonition to remain neutral and open-minded in evaluation of the reasons for or against legal change is to some extent simplistic without the investigation of how objective reality comes to be implicit and unquestioned in the minds of judges. This investigation includes the ways in which reality is structured and how this structuring conditions human beings to think in predetermined ways.

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[18] See discussion in D. BEM, *supra* note 16, 40–53. This illogical response to communication is termed "semantic generalization."

[19] *Id.* at 42–43.

[20] *Cf. id.*

[21] *See* C. Myers, Ricoeur's Phenomenology of the Will: A Critical Examination from the Perspective of Husserl's Phenomenology, May 1969, at 47 (unpublished M.A. thesis in the University of Texas at Austin Library).

[22] *Id.*

Social Institutions

To have any cohesion a society must operate to a great extent upon an intersubjective agreement as to the nature of reality within that society.[23] Even in a modern, complex society there is the need for a shared core of agreements as to reality and the goals of society which are formulated in respect to that reality.[24] These agreements as to what is reality affect all decisions on what the law should be, extending even to how one should behave in all sorts of public and private situations.

To operate efficiently an individual must follow what society has said are the facts of social life, and he finally must be able to accept this socialization to the point that he knows what proper behavior is. In this way, the facts of life and the way to react to those facts are largely predetermined and inculcated in people within society. This agreed-upon, socially constructed reality and the predetermined modes of behavior that go along with it influence and channel human behavior. The inherent biological limitations of man are also such that he must function in accordance with some type of unquestioned assumption as to reality.[25] He simply cannot reexamine each social or private situation and make constant conscious decisions about his behavior.

Generally an individual neither recognizes that his behavior is controlled or guided in this way, nor that the patterning itself derives from accepted human decisions. The individual thinks of himself as one who has no control over what to him is common sense reality, and as one who acts in such a way because of the unquestionable validity of this reality.

Likewise individuals may be unaware of the process of typification through which they attempt to deal with others. In order to operate within a society of human beings, a person must categorize or typify others so that he does not have to evaluate each individual with whom

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[23] *See* P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY 125 (paperback ed. 1966) [hereinafter cited as BERGER & LUCKMANN].

> In this regard, intersubjective agreement means what is (especially cognitively) common to various individuals. In daily life, a person takes the existence of others for granted. He reasons and acts on the self-understood assumption that these others are basically persons like himself, endowed with consciousness and will, desires and emotions. The bulk of one's ongoing life experiences confirms and reinforces the conviction that, in principle and under "normal" circumstances, persons in contact with one another "understand" each other at least to the degree to which they are able to deal successfully with one another.

A. SCHUTZ, ON PHENOMENOLOGY AND SOCIAL RELATIONS 319 (paperback ed. H. Wagner 1970) (glossary).

[24] *See id.* at 51–52.

[25] Although the social order is not derived from biological data, the necessity for social order as such stems from man's biological equipment. *Id.* at 52.

he comes into contact. Accordingly, we place others in categories which in our minds call for certain patterns of behavior on our part. Think, for instance, of the different attitude and approach taken when confronting a "Professor" and a "Student." The labels trigger different images and thereby different reactions. People also expect a "Professor" to behave in a certain manner.

Such stereotyping or typifying of other people in society is most difficult where there are constant face-to-face relationships between a person and a member of one of his stereotyped classes.[26] The more individual characteristics of the other person are brought home in a direct manner, the more the differences between these and the artificial characteristics making up the stereotyped concept become visible, and this tends to cause what may be at least an unconscious tendency to question the stereotyped attitude. Where, however, this face-to-face confrontation is not available, the stereotyped attitude toward other classes of people remains largely untested and unquestioned.[27] The general effect is that the stereotype becomes an implicit attitude which is taken to be validly based upon "true" reality. This is to say that these embedded and unquestioned attitudes become a person's view of reality as he conceives such to be in his society. The implication is that individuals, including judges, may well go about their lives making decisions as to their relationships with others based upon such attitudes.

When societal typifications become problematical the effect on the law may be dramatic. Civil rights activities and the more recent emergence of the women's movement are obvious examples. As to the latter, taken-for-granted assumptions that women belong in the home, that they are not suitable for many types of employment, and that they have a lesser status in the eyes of the law have all been brought into question both through public and political protest and through legal challenge. This "consciousness-raising" is based upon a critical analysis of implicit assumptions or prejudgments and their implications for the individuals involved.

The law not only represents the accepted modes of behavior in this society, but also enforces and reinforces these accepted modes of behavior. Thus the law strengthens accepted patterns. Furthermore, it defines for people in the society the "correct" way of behaving and ordering their everyday lives. This effect is present even without the penal sanctions which are a part of the enforcement machinery of this

[26] *Id.* at 30–32.
[27] *Id.*

particular institution. Many, if not most, people tend to act according to law without consciously assessing the possibility of legal punishment. A driver who runs a stop sign on a lonely road where there is no chance of collision or of being caught by the police may still feel strangely uneasy with himself. Thus, institutional definitions of proper conduct become to a large extent subsumed in individual attitudes toward reality. The law is perceived as an objective reality, and human activity gradually becomes more forcefully guided by it.[28] Individuals act according to the law because they know it to be the "right" way even though the reasons for determining this rightness are obscured in the past.[29]

An institutional world can in this way become or be experienced as an objective reality. The people who must live with or within an institution may forget that this world and this objective reality are basically creations of human beings with all their own inconsistencies and are not natural or ontological truths of life.[30] They view this reality as being other than a human product and most often unconsciously imbue it with characteristics of validity which are separate and above human control or questioning.[31] Even laws which are repealed or overruled leave behind them the inculcated patterns of thought and habitualized behavior which continue to control the activities of people. This is especially true where these laws were of long standing and were part of a whole scheme of related law sand social agreements.

An example of this can be seen in the school desegregation cases which began with *Brown v. Board of Education*[32] in 1954 where enforced segregation in public schools was held unconstitutional. In 1968, in light of the lack of progress made toward removal of a dual system, the Court held that a "freedom-of-choice" plan did not satisfy the *Brown* rule, thereby holding that school boards have an affirmative duty to integrate.[33]

A reason for this shift can be seen in the fact that the simple removal of legally enforced segregation had not worked to remedy the

[28] Control of human behavior and thought is inherent in institutionalization. One of the most important gains is that institutions control human conduct by setting up predefined patterns of conduct so that each person will be able to predict the actions of others. *See id.* at 54–57.

[29] Definitions of reality may be enforced no matter what their practicality by the use or threat of force so that they begin to be validated "by social rather than empirical support." *Id.* at 119.

[30] This apprehension of human phenomena as nonhuman things works toward the dehumanization of the social and institutional worlds. *See id.* at 21, 89–90.

[31] Man is in this way capable of forgetting his own authorship of the human world and the dialectic relationship between man and his products. *Id.* at 90.

[32] 349 U.S. 294 (1955).

[33] Green v. County School Bd., 391 U.S. 430 (1968).

major perceived ills caused by a dual system of education. This so-called "freedom-of-choice" plan did not lead to significant changes in ingrained habits of thought and action.[34] The many years of legally enforced separation in education in conjunction with numerous other socially enforced separations could not but have reinforced people's acceptance of this mode of social ordering as an objective reality—a fact of life. While the law itself could be overruled with one decision, neither the perceived social reality nor the effect of decades of reinforcement of those social patterns could be changed as quickly.

Obviously judges are not immune to this process. It is difficult for them, as for any individual, to look beyond what appears to them to be objective reality. It is difficult because the knowledge which a judge gains through his socialization and the law's institutionalization is often taken to be coextensive with the knowable or at least the rational knowledge available.[35] It is very difficult to argue that a judge does not understand what present reality is, either in everyday life or in the law.[36] To do so to some extent questions part of his basic knowledge which guides his professional activities. It is also extremely difficult to ferret out predispositions or biases which may be not only hidden but cemented under taken-for-granted attitudes as to their ultimate validity.

Another obstacle to judicial objectivity is created by the fact that the law as an institution has to be justified. In order to efficiently transmit the old social reality to the young or to the disenchanted, experts must seek to formulate consistent and comprehensive theories to explain and justify the old way of doing things.[37] Often, these theories are supported by symbols which must themselves be presumed valid. In law this would be similar to justification of a particular rule by reference to a legal myth or fiction. To analyze the legal myth or fiction would lead either to circular movement within the system or to the administrative or bureaucratic needs underlying the myth.

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[34] This is not, of course, to say that other factors do not contribute to continuing separation in schools.

[35] "What is taken for granted as knowledge in the society comes to be coextensive with the knowable, or at any rate provides the framework within which anything not yet known will come to be known in the future." BERGER & LUCKMANN at 66.

[36] This problem is related to the workings of defensive attitudes which serve to protect a person's mental thought structure.

[37] One can only speak of a social world with the appearance of a new generation. The old generation helped create the world and its reality, and they are part of it. The transmission of their social reality requires the interpretation of its meanings in theoretical forms which must be consistent and comprehensive in order to better justify its control of others. The young are more likely to deviate from programs set up by others than from those set up by themselves. *See* BERGER & LUCKMANN at 61–62.

Eventually the justifications take on a validity or reality of their own. Theoretical justification of institutional acts not only gives dignity to the matters in question, but also influences decisionmakers and in this way creates its own additions or modifications to institutional reality.[38] For example, the judge who decides a case on the basis of a legal myth or fiction thereby creates an extension of the existing law which must be lived with in the society and which may, in turn, decide other cases.[39] In this way, theoretical justification can stimulate further reality construction which may all be unsupported by factual reasons in the present social environment.

Similarly the theoretical superstructure in which the judge is trained may subtly demand consistencies with social and legal structures which have little to do with the human objects of law. A judge, who is vulnerable to the same socialization as all people and holds an important position within the legal institution, is also a legal theoretician. His mental attitude structure will undoubtedly be attuned to the social and institutional framework in which it was formed and to which he has contributed. His values and goals will be imbedded in established law and procedure which may be viewed as the necessary and proper implementation of these values and goals. The fear of professional disfavor will also reinforce any personal restraints which cause a tendency to recoil from radical change.

Language

Language formulation is another way in which the thought processes and behavior of individuals may be controlled and conditioned. Language acts as the representation of constructed reality and contributes its own influence in validating that reality.[40] It is formulated

[38] A principle of law which is said to underlie more particular rules will cause the rules to be modified so as to better accord with the principle. In turn, new rules will be formulated to better serve the accepted basic principle. It must be remembered that this discussion seeks only to point out how law *may* subtly move away from its human base.

[39] Theoretical justification creates its own objective reality which may implicitly be used to further validate the theoretical structure through a "snowball" effect. The massing of many particular rules all pointing to one way of doing things may exert a tremendous psychological influence upon individuals which forces them to accept without question those dictates.

[40] Language originates in everyday life. It refers above all to the reality experienced in everyday life which is dominated by the pragmatic motive to "get along." Language also typifies experiences, allowing them to be subsumed under broad categories which have meaning to an individual and to his fellowmen. The continuing use of the same language to objectify and understand these experiences has a fundamental reality-maintaining effect. *See* BERGER & LUCKMANN at 38–39, 154; Probert, *Word Consciousness: Law and the Control of Language,* 23 CASE W. RES. L. REV. 374 (1972); McCoy, *supra* note 5, at 1279.

specifically to aid people to operate within a society, and its common meanings bind individuals to a common way of thinking. Expression serves the individual need for objectifying thoughts and ideas; for these to be intelligible in communication they must be molded to the available linguistic tools. Once objectified in a common language, these ideas represent the speaker and he, in turn, seeks to accommodate his thinking to what his expressed ideas stand for. In psychological terms he will seek consonance or consistency between his actual ideas and those he expresses with an added strain toward remaining faithful to his public opinions because of ego-involvement. The goal in discussing language and the law is not to formulate a description or theory of such language use—a task as impossible as the formulation of a comprehensive theory of the analytical model used in judicial decisionmaking.[41] The goal is, instead, an attempt to clarify and explain ways in which legal discourse may hamper critical judicial analysis of legal problems.

In law we may know the facts about some matter and yet look at them mistakenly;[42] likewise, the words we use to characterize these matters may carry these misconceptions even with the most determined effort toward precise definition. Further, these words may be applied for various reasons as descriptions or prescriptions which do not accord with their original or common meanings.[43] The difficulties with precision of analysis may, therefore, come from not only misuse and misapplication of language, but also from confusion of ordinary and technical meanings. Even the most technical use of a word may involve implicit emotional connotations which can confuse the technical issues at stake. An example of this is apparent in the current legal question—"Is a fetus a human being?" This issue which parades as a fact question is really concerned with whether or not a fetus is to be given legal protection.[44] The initial confusion is made more difficult by the tremendous emotional freight carried by this phrasing.

Language is also part of the socialization process. Through a dynamic dialectical relationship language can be modified by the objective reality of society and, in turn, through its own nature modify this objective reality.[45] Also, to the degree it remains constant, language

[41] *See* J. BRKIC, NORM AND ORDER 12 (1970).

[42] *See* Austin, *A Plea for Excuses,* in ORDINARY LANGUAGE: ESSAYS IN PHILOSOPHICAL METHOD 41, 55 (V. Chappell ed. 1964).

[43] The common meaning may unconsciously modify the technical application of a term.

[44] *See* Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217, 1236 n.6 (E.D. La. 1970); McCoy, *supra* note 5, at 1288.

[45] *See id.* at 1283–85.

works to maintain the socially determined reality. The continuing use of the same language to describe experiences tends to solidify or stabilize the ways in which people think about these experiences. In this way, language is a major instrument for ordering and controlling the behavior of individuals within a society. Even the conception of new modes of behavior, whether social or legal, is initially difficult without a change in the common language or a reinterpretation[46] of the relevant parts.

In the law the whole process of structuring human fact situations so as to be legally relevant involves the reinterpretation of these facts in order to make them fit the language of prior cases or legal rules. This remolding of facts to fit preordained linguistic molds can become the equivalent of legal logic; and one who strays from these guidelines may be considered irrational, or worse, irrelevant.[47] This equivalency is enforced even if language must be remolded in the process.[48]

Here again the need to question the objective realities constructed by legal institutions is manifest. The court, for instance, may subtly lose awareness of the fact that a certain mode of behavior has been included in or excluded from a linguistically expressed category of legal protection solely because of a human decision to do so.[49] The tendency is then to accept such categorization as reality or as a fact of nature. Thus, in criminal abortion reform cases the struggle may be concerned with the comparison of a fetus and visible members of society, leaving untouched the basic reasons for protecting human beings.[50]

It is also obvious that legal language used in argumentation to courts, as well as that used to justify court opinions, can and often does carry factors meant to move those addressed. These are most convincing when hidden within the language itself, such as through the phrasing of issues in terms which channel the analytical process in one or the other direction. In many ways the statement of the legal question will

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[46] *See* BERGER & LUCKMANN at 159.

[47] Language provides the fundamental superimposition of logic on the legal world. The theoretical justifications for the legal system are built upon language, and language is used as the legal system's basic instrumentality. *Cf. id.* at 64.

[48] If language does not change, legal logic can represent little more than the excessive adherence to the literal or settled meaning of a legal term and be ultimately decried as "the bark of a hard and narrow verbalism." Schuylkill Trust Co. v. Pennsylvania, 296 U.S. 113, 129 (1935) (Cardozo, J., dissenting). This structuring of legal language tends to present a more or less neatly ordered field of thought. Legal conceptualization may cause a court to recoil from challenges to established law because these challenges must to some extent intrude upon the thought patterns associated with those laws.

[49] *See* McCoy, *supra* note 5, at 1279, 1283–85.

[50] *See generally* Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp.

determine the legal conclusion drawn. Not only will constructed and established legal language work toward the acceptance of a phrasing which fits within the system, but once the issue is so phrased the established patterns for analytical thought will inexorably move the process toward an acceptable decision within the same system.[51] A failure to question the underlying prejudgments thus forces the analytical process along a path within the existing system and its established and self-supporting parts.

One way of breaking these tendencies toward institutional closure is by a heightened awareness of words used in law.[52] A legal term may be elucidated by the investigation of the standard conditions in which a statement containing it was true. This is a reference to the original meaning of the word as it was brought into legal usage. This allows a weighing of its relevance to the present or challenged usage which in turn may require careful reinterpretation according to present needs for relating law to changing social conditions. In abortion cases this would involve a recognition of the specific instances in which human life is legally protected and why this is so. This examination would allow reasoned analysis of the distinctions available between the usual cause of protection and the protection of a fetus.

The intellectual abstraction, which is much of legal language, becomes problematical when conditions deny the appropriateness of the abstraction and call for reinterpretation. Bringing about this conceptual change is essential if law is to remain relevant and controlling in society. The language of law may never be, or never be required to be, totally understandable to laymen since it is concerned with institutional machinery with which laymen are not usually acquainted. The need is not for painful dissection of each verb, adverb, noun, pronoun, preposition, and adjective, but the realization of the limitations and restrictions upon legal thought inherent in the use of structured language as they relate to the flexibility of judicial lawmaking. The need is for an understanding of the part played by language in the constitution of facts and of the fact that to a great extent the limits of the language used by an individual or an institution are the limits of their worlds and what is considered rational within them.[53]

1217 (E.D. La. 1970).

[51] *See* McCoy, *supra* note 5, at 1279.

[52] This sharpened awareness of words is necessary so that we may also sharpen our perception of the phenomena they represent. It is not, however, to be construed as the judging of the phenomena. Austin, *supra* note 42, at 47.

[53] S. ERICKSON, LANGUAGE AND BEING: AN ANALYTIC PHENOMENOLOGY 100 (1970).

CRITICAL DECISIONMAKING

The aim of a truly critical judicial analysis must be to question the attitudinal, social and linguistic factors which create what appears to be the objective reality. An unquestioned acceptance of the validity of the constructed reality supports the legal status quo, violates the neutrality of the judiciary, and inhibits the ability of the legal system and the judiciary in thoughtful evaluation of legal change. When a distinctively new rule of law is proposed in regard to what has become a controversial issue, reference solely to established tools in the appellate decisionmaking process overlooks the essential difference of this type of problem. These established substantive tools or propositions have been formulated on the basis of accepted views of reality and accepted conclusions as to human action in regard to that reality. The law is said to follow society and to be based on the generally accepted values and morals of society. Controversy, however, is evidence of a breakdown in the general agreement as to a particular view of reality, as to the conclusions to be drawn from that view of reality, and as to the definition or application of related values.[54] When substantial controversy exists, appellate decisionmaking must move away from the descriptive and normative propositions which would ordinarily be used in resolving the issue because it is these very propositions and what they represent which are, in fact, being challenged.[55]

Modification is required in the decisionmaking process as applied to this type of issue in order to retain neutrality as to the values involved. When society no longer agrees upon a socially constructed fact, judicial adherence to the old fact is not value neutral. Neither can the courts simply accept a new idea and apply unique methods of resolution and decision which place that idea into law. Courts may well sympathize with the new idea, but they cannot simply accept that idea and a whole scheme of new, supporting justifications—new in the sense of not having been established in previous judicial decisionmaking. Any new structure of justifications, if one is even available, will lack the characteristics of objectivity; and, therefore, any such opinion appears subjective, as judicial legislation, or as an attempt at imposition of the court's morals on society—in effect, the opinion will not meet the required standards for legal logic.[56]

Even though a challenge to the legal status quo reflects a changed

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[54] *Cf.* Lévy-Bruhl, *The Sources of Law: Outlines of a Theory*, 38 U. CIN. L. REV. 663, 667 (1969).

[55] *Cf. id.* at 673.

[56] *See* Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 24 (1924).

awareness of the involved social situation and, for success, must escape the application of established propositions which reflect the old, unchanged awareness, it must somehow enable the court to resolve the issues favorably through an objective, legal method.[57] The resolution as expressed in an opinion must be based on objective propositions. If not, the court must ask society and the legal profession to accept a new determination in regard to the particular situation based on new propositions which themselves have not been tested and accepted as valid.

Ideally, the court must avoid analysis of the issue on the basis of those normally relevant propositions which undercut the apparent validity of the desired conclusion. It must also present supporting propositions which are objective—propositions which have been articulated and tested in the crucible of judicial discussion and criticism. It must justify its reliance upon established law other than that usually thought relevant to the solution of the particular problem. In essence, it must justify a change of perspective in regard to the reality of the situation involved.

Since the initial difficulty in accomplishing this lies in the hidden assumptions underlying conscious ideas which are reflected and reinforced by the terminology used to describe those ideas, one must begin by seeking new but applicable ways of describing and discussing the problem situation. In the beginning of the process of change, there may be little or no concept of what the new terminology might be or in which direction it might lead. Once a tentative analogy and possible new argument in regard to the problem becomes known, the remolding of descriptive terminology can be guided by the end to be reached.

By purposely describing a problem situation in different ways, a court can compensate for the subtle controls inherent in language and break out of what, on occasion, might appear to be a conceptual box. The purpose is to find a new way to state the question so that, in effect, it can justify a new way of answering that question. Analysis is a tool to be used in legal problem-solving and holds no magic when separated from that purpose. In presenting any new description, the words used cannot be unbiased but must be reasonably applicable. Since words reflect the view of reality prevailing in society and since that view is to be challenged to the extent it justifies the old law, change in descriptive terminology may supply a changed or more comprehensive perspective. Change in terminology also works to break the ties between the way in which the problem is usually described and the way in which it is

[57] *Cf.* Lévy-Bruhl, *supra* note 54, at 688–89.

usually resolved. In essence, the method involves a varying of the elements which control perception of the problem so that there can be a varying of the way in which its resolution may be conceived.

TWO EXAMPLES OF CRITICAL ANALYSIS

The Abortion Issue

In *Roe v. Wade*[58] the United States Supreme Court struggled with the issues involved in the challenge to a state's authority to prohibit a woman's access to medical termination of her pregnancy. The pivotal question in an abortion case can be stated to be whether a fetus is human life as of conception. If this question is answered in the affirmative, the woman's rights of personal privacy become secondary to the interests of the state in preserving human life. The Court struggled to get away from this statement of the issue and argued that it "need not resolve the difficult question of when life begins."[59] The Court acknowledged the conflict in philosophical judgments on this question and turned to a discussion of privacy rights versus compelling state interests in promoting the health of the mother and, finally, in the potentiality of human life.[60] By including references to "potentiality" of life, however, the opinion was seemingly bound to the philosophical question in that the decision involved a direct conclusion in regard to that question. This fact prompted Justice Rehnquist in his dissent to accuse the majority of judicial legislation[61] while pointing out that "the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellants would have us believe."[62]

Abortion is at least temporarily a settled issue, and any new analysis or new perspective is assisted by the analogies already accepted by the majority. Even though an advocate favoring broader rights to abortion must avoid being enmeshed in the "fetus issue," this statement of the crucial issue for abortion is important since it involves descriptive language recognized to be applicable. It has been recognized that, when broken down to its basics, this issue asks the legal question of whether the fetus is similar enough to you and me to be offered the same protections.[63] This phrasing removes the possible confusion engendered by the use of the terms "human being" or "human life." To argue the

[58] 410 U.S. 113 (1973).
[59] *Id.* at 159.
[60] *Id.* at 146–47.
[61] *Id.* at 173–74.
[62] *Id.* at 174.
[63] McCoy, *supra* note 5, at 1289.

negative using the "human life" phrasing appears irrational since a fetus is some sort of life or being as a matter of common sense. What common sense may not tell us is that the term "life" carries with it an implicit human decision as to the value of life.[64] When used in reference to humans, "life" really means protected life in the minds of those using the term. This specific form of life is considered a higher and more valued form, but essentially is protected for very practical reasons having to do with the wants and needs of the individuals comprising this society.

One of these is the recognized need for order in the society and protection of its individual members from harm. We assume that the devaluing of the lives of members of society would create havoc and destroy the orderly progression towards society's goals. This assumption is bolstered by ideas of democracy which place importance upon the individual members of society as opposed to some favored group or class. For whatever reasons, the basic intersubjective agreement within this society is that its members are to be protected in their ability to continue existing. A reason for this decision is that if such life is not protected in general, the danger for each individual increases. We, as individuals, agree to protect others in the society for the very basic reason that we wish to be protected ourselves.

The societal need for the protection of life is inextricably tied not only to self-protection, but to the perceived danger to that self-protection. We often act in accordance with what we perceive as a threat, and these perceptions control the way in which society orders its members.[65] The major way in which such danger is perceived is through physical harm or death caused to individuals whom we see as similar to ourselves. There is never the same emotional upset in hearing of deaths in distant countries, for instance, as there is in hearing of the death of individuals in our own community. In addition, we can only share this feeling of similarity with others through our conceived sharing of conscious experiences.[66] The death of a lawyer brings greater unease to other similarly aged lawyers than the death of some less similar person. We cannot feel the same similarity to the lives of lesser animals since there is no possible concept of the conscious experiencing as a lesser

[64] *See* Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217, 1236 & n.8 (E.D. La. 1970); McCoy, *supra* note 5, at 1288–89.

[65] *Cf.* MacLeod, *The Phenomenological Approach to Social Psychology*, in PERSON PERCEPTION AND INTERPERSONAL BEHAVIOR 33, 45 (R. Tagiuri & L. Petrullo eds. 1958).

[66] *See id.* at 44–45; *cf.* Husserl, *Phenomenology and Anthropology*, in REALISM AND THE BACKGROUND OF PHENOMENOLOGY 120–21, 138 (R. Chisholm ed. 1960).

animal. We, therefore, do not protect their lives and can readily accept the deaths of animals, especially when such serves our own needs or the needs of others. The experience of collective consciousness with the categories of lesser and greater similarity is a crucially important determinant of our behavior with reference to others and ultimately for the way in which the social world is organized by and for us.[67]

We begin by needing or wanting to exist and thereafter collectively seek to ward off any perceived threat to that need or want. On the other hand, our perception of the devaluation of life in particular instances can raise our level of tolerance for that and further devaluation. In the criminal abortion reform case the question is whether the termination of pregnancy and the destruction of the fetus devalues our form of life in the eyes or through the perception of the individuals in our society. The perceived danger comes not simply from what the law may do, but from what others may do to us. Should the tolerance for death and killing rise in the society, our own existence becomes more of a precarious venture.

The question of whether a fetus is similar to you and me comes down to whether we can perceive similarity through conception of a shared consciousness. "Conception" in this sense is the subjective act of an individual as opposed to what he is told to believe. Thus, where empathy stops, so stops our conception of similarity.[68] The knowledge that a fetus will ordinarily be born into the world and the fact that at a certain stage it takes on the form of a human baby are influences to be considered. This knowledge does not, however, prompt society to surround the death of a fetus with the same formality as even that of the newly born baby. The distinction lies in the fact that not only can we see the baby, but we can also conceive of its conscious wonder at its new life. Although there can be only a dim remembrance of our own experience at such an early stage, there can be at least a conceived sharing of those experiences with the baby.

The fetus is removed from any perception of similarity in that it is unavailable for any human attachments and is not visible, and no one can readily conceive of conscious experiences in the womb. The failure

[67] *Cf.* D. BEM, *supra* note 16, at 6.

[68] In the case of other peoples we are able to conceive of shared experiences through the spread of cultural information. The fact may be that we understand other people and their basic similarity to ourselves, but deny this fact for different reasons through recourse to superficial distinctions. In effect, others may be seen as dissimilar because of the stereotypes used to bring order into our lives and not because we cannot conceive of a conscious sharing of experiences. The difference is that to conceive of this similarity, we need facts; in the case of the fetus, we can only theorize.

of human conception at this point is precisely why philosophical and religious theory plays such a large part in deciding this question. Because we cannot know of the similarity ourselves, someone must tell us that it does exist.

Because of the absence of any perceived similarity, the termination of pregnancy and the destruction of the fetus is unlikely to brutalize our society and thereby endanger our own existence. On the other hand, the law's disregard for the plight of many of those affected by the prohibition of safe medical abortion has its own brutalizing effect upon individuals who see and begin to accept this type of callousness. For purposes of the law there are distinct and medically provable points upon the continuum of pregnancy at which lines can be drawn in light of the need for order and self-protection, which can allow for safe and inexpensive methods of meeting the problems of the women affected.

The existence of the controversy surrounding abortion is evidence that there is no universal acceptance of either answer to the fetus-as-human-life question. Because law follows the collective will, the creation and evaluation of normative rules is a social decision both in its scope and in its basis.[69] When substantial debate reveals an established modification in that collective will in regard to a particular issue, an appellate court cannot remain unaffected. In order to remain in accordance with collective agreements which give law its validity and strength, the court must solve the problem presented in a way which does not require a value choice directly in the stated area of conflict. A new relevance must be found to other areas of the established law—established and representative of the collective will.[70]

An initial conceptual difficulty which must be met is the tendency to equate legislative decisions with the collective will. Such an equivalence would automatically justify every statute. Statutes and court-made law reflect the collective will only in the ideal sense. In reality, law as seen in statutes or in court opinions is only evidence of the collective will. Also, no one issue will ever be resolvable by direct reference to an actual universal agreement among the members of a society. This is to say that the collective will is an ideal to be used as a guide in decisionmaking. To speak of objectivity and value neutrality in regard to decisionmaking is not to describe reality; yet in progress toward these ideals higher degrees of fairness and justice result.

Analogy to other law provides, in the abortion case, evidence of

[69] *See* J. BRKIC, *supra* note 41, at 151.
[70] *See* Lévy-Bruhl, *supra* note 54, at 673.

the real perceptions of society as a whole on the fetus issue. The Court in *Roe* held that a fetus could not be considered a "person" under the fourteenth amendment, as was argued for the Texas law, and noted that in nearly all the instances in which the term "person" was used in the United States Constitution, it has application only postnatally.[71]

Article 1205 of the *Texas Penal Code* reads, in part, "The person upon whom the homicide is alleged to have been committed must be in existence by actual birth."[72] The Texas Court of Criminal Appeals stated in a 1971 abortion case that this language "is an implicit recognition of human life not in existence by actual birth."[73] Here again, the implicit asumption of value attached to "human life" works to confuse matters. Article 1205 may well imply that something exists prior to the time of birth, but an express exclusion from the definition of homicide does not imply that protection should be provided to what is excluded. By reading the homicide and abortion laws as consistent, the court cuts off any ability to test separately the rationality of the abortion statute but, in effect, justifies that law by the fact of its existence. Why did the State of Texas enact homicide statutes defining a human being as one who is in existence by actual birth? This was, was it not, because of a subtle collective sense or reason which determined that this definition included all those who need be protected.

If the intuitive reason of the people in general resulted in the conception of a fetus as a human being, abortion would be included as a type of homicide. A reason for separate handling might be the exception of abortions procured by medical advice to save the life of the pregnant female. Texas, however, also does not penalize those who commit homicides under certain circumstances. By excepting certain abortions rather than classifying them as justifiable homicides, Texas denies the fetus due process of law. The determination of justifiable homicide is made by prosecutors and grand juries, but "justifiable" abortion is the determination of medical experts. Why are not those pregnant women and their medical experts required to submit to the established legal processes before they kill a human being?

Until 1967, the civil law of Texas did not allow recovery of damages

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[71] 410 U.S. at 157 (1973).

[72] TEX. PENAL CODE ANN. art 1205 (1961). The new Texas Penal Code, effective Jan. 1, 1974, reads, "'Individual' means a human being who has been born and is alive." TEX. PENAL CODE ANN. § 1.07(a)(17) (1974). References in text are to the *Texas Penal Code* of 1925, in effect when *Roe* was decided.

[73] *See* Thompson v. State, 493 S.W.2d 913, 919 (Tex. Crim. App. 1971), *vacated*, 410 U.S. 950 (1973).

for the death of a child due to prenatal injuries caused by negligence.[74] In 1967, the Texas Supreme Court held that a viable infant born alive would have had a cause of action had it survived and, therefore, the parents could recover under the Texas wrongful death statute.[75] The reasoning of that opinion strongly supports the conclusion that the decision was dependent on a live birth, although the court expressly reserved this question. In the dissent to the lower appellate court opinion in that case, Justice Cadena made the following statement in footnote:

> The absurdity of the doctrine that the unborn child is but a part of its mother is obvious. It is not uncommon today for a living infant to be born after the death of the mother. This would not be possible if, as the courts were once wont to insist, the child was only part of the mother and had no separate existence.[76]

Justice Cadena failed to note that it is also not common today for other living parts of the body to be removed from a person after death. The distinction is that at birth almost everyone, consciously or unconsciously, perceives that a human being has come into existence for the first time. This perception is further evidenced by the common description of birth as "a beginning."

If the evidence provided above supports as more reasonable the conclusion that the people of Texas do not actually perceive of a fetus as human life, a separate and distinct rational basis must be provided to justify this governmental intrusion into individual decisionmaking. The abortion statute cannot be justified on the same basis as a murder statute or on the basis that a fetus is some form of mystical half-life. The Court in *Roe* found a valid state interest in the protection of the "potentiality of life" at viability because the fetus then has the capability of meaningful life.[77] It did not explain why this "capability" is determinative. If "potentiality" is viewed as the potential existence of protected life, this holding is that a state is justified in protecting something now because the state would be justified in protecting it later (at birth). A state interest in the potentiality of protected life can only be an interest in the quantity or quality of future additions to the existing members of society (protected life)—population control. If a state cannot justify its intrusion into the personal lives of its citizens on this ground, the

[74] Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).

[75] Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820 (Tex. 1967). *See also* Roe v. Wade, 410 U.S. 113, 161–62.

[76] Leal v. C.C. Pitts Sand and Gravel, Inc., 413 S.W.2d 825, 829 n.16a (Tex. Civ. App. 1967).

[77] 410 U.S. at 163.

issue becomes solely one of whether or not states need justify their action at all in these cases.

The Obscenity Issue

The attempt to describe the abortion problem in a way which gives rise to a changed perspective is made easier by the fact that the Court provided authoritative direction. The "intractable" obscenity problem, however, is not as easy. The authoritative view reflected in the new obscenity opinions is a hardening of the legal support for those who wish to prohibit exhibitions or descriptions of sexual conduct. In *Miller v. California*,[78] the Court, per Justice Burger, set out the following guidelines for the trier of fact in an obscenity case:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[79]

The opinion denies the applicability of the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*[80] and also states that "community standards" are not national standards but those of the community as reflected by a jury.[81]

In a companion case, *Paris Adult Theatre I v. Slaton*,[82] Justice Brennan in dissent disagreed with the view that a state could constitutionally suppress "obscene" films "even if they were displayed only to persons over the age of 21 who were aware of the nature of their contents and who had consented to viewing them."[83] He described in great detail the frustrating history of the attempt to formulate a definition of material *not* protected by the first amendment, and he concluded that the court must instead focus on the sufficiency of the state's interests for intervention in this area.

What is "obscenity" and why has the Supreme Court had such difficulty in defining it? Justice Douglas stated that it is "at most . . .

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[78] 413 U.S. 15 (1973).
[79] *Id.* at 24.
[80] *Id., rejecting* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966).
[81] 413 U.S. at 31.
[82] 413 U.S. 49 (1973).
[83] *Id.* at 78.

the expression of offensive ideas."[84] Others argue that "obscenity" refers to depicitions or descriptions of human sexual activity which are to be excluded from the protection of the first amendment. Justice Brennan noted in passing that the Court's refusal to give protection to such expression was thought to be a reflection of the universal judgment that it should be restrained.[85]

Is it reasonable to assume that such a perplexing problem of definition could arise if there were universal agreement as to what should be punishable? How can we as a society agree to punish what we cannot describe or define? Given the freedom to define what should be punishable, a part of the population could easily agree to a very precise definition. They might describe all sexually oriented material; Justice Brennan and others might exclude material which had social, political, or artistic attributes even though primarily concerned with sexual activity. A significant segment of the population might well refuse to describe or define any sexually oriented material as punishable. It is, in fact, this diversity of opinion or value judgments and the lack of anything approaching universal agreement which make impossible an efficient and value-neutral definition of obscenity. Judges and legal scholars may try as they will, but any product will ring false because it will be a direct value choice for society, not by society.

If there ever were universal agreement to suppress all sexually oriented expression, there would be little problem with definition. As exceptions become necessary, definition becomes more difficult. These exceptions become necessary when a significant part of society recognizes the worth of some sexually oriented expression. This more complicated definition, in turn, reflects the breakdown of any universal agreement and the beginnings of controversy. The controversy causes stress between those seeking total suppression and those seeking to save what they see as valuable. The intensification of the controversy causes the history of frustrating attempts at resolution of the problem. A direct value clash arises with the emergence of the opinion that sexually oriented expression has value in itself as a way of alleviating the frustrations and anxieties caused by conditioning in regard to sexual matters. This makes untenable a compromise on the specific conflict of value judgments. To change the issue from a description of that conflict will bring about the charge that the court avoids "the" issue or the "correct" statement of the issue. Courts must, however, solve problems; part of

[84] *Id.* at 71.
[85] *Id.* at 105.

their effort to do so has traditionally been concerned with stating legal issues in a way which allows of resolution.[86]

One line of reasoning is that which justifies Justice Brennan's suggested focus on the legitimacy of the state's interest. He has noted in passing that the imposition of what a person considers to be obscene has all the characteristics of a physical assault and may constitute an invasion of his privacy.[87] Justice Burger, in explaining the new test, repeatedly described the punishable expression as that which is patently offensive.[88] The point is that a person because of social conditioning can be physically and emotionally shocked when subjected to what he deems obscene. Whether another person thinks he should be shocked or not is irrelevant. Those holding to a traditional view are essentially defining what is shocking and harmful to them in this situation because of their particular, but not unique, nature. This harm, even though not universally experienced, is the basis for state intervention. There is, undeniably, a legitimate state interest in protecting citizens from this personal harm. On the other hand, there is no basis for suppression where this harm is not likely to be experienced except by consent. A person possessing pornographic material in his home does not pose any such danger to others.[89] Commercial material and exhibitions which do not intrude on the usual public thoroughfares and which are viewed only after consent of the audience do not invade upon the citizens' right to be free from personal harm.

The only reasonable basis for the interest of the state is the protection of a person's right to consent before exposure, which includes the right of parents to consent for their minor children. Punishment arising from this state interest is justified only for exhibitions which violate the right to consent, not for the act of expression or exhibition itself. A definition of that which requires consent can include any sexually oriented material irrespective of its attributed value. In this way, Justice Brennan's suggested approach does not preclude "those governments from taking action to serve what may be strong and legitimate interests through *regulation* of the manner of distribution of sexually oriented material."[90] Stating the issue in relation to legitimate

[86] *See* text accompanying notes 53–55 *supra.* It should also be noted that recognition of an insoluble statement of the issue does not decide the case since each side has the opportunity to propose its own revised statement.

[87] 413 U.S. at 106–07.

[88] 413 U.S. at 24–25.

[89] This view was given constitutional imprimatur in Stanley v. Georgia, 394 U.S. 557, 567 (1969).

[90] 413 U.S. at 113 (emphasis added).

interests as described also opens avenues for more efficiently alleviating "the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults."[91]

Concluding Remarks

Since I have chastised tradition for its subtle control of modern decisions, I should also make explicit some of the assumptions underlying this discussion. The most fundamental of these is my assuming as valid a conclusion that human reasoning cannot be said to yield up ultimate truths. This is similar to John Dewey's argument that in a changing society the logic of judicial decision must be one of "prediction of probabilities rather than one of deduction of certainties."[92] Propositions held valid in law cannot be held valid as ultimate or ontological truths without assuming that mankind has perfect knowledge of that part of existence described in the proposition. I assume that we have imperfect knowledge of both our existence and of our tools for gaining and for describing that knowledge. This, however, is not to say that we should not use reasoning as our best tool for seeking greater understanding. In this sense, any proposition can only be said to contain the best description of our best estimate of the truth of the situation.

When necessary, we must be able to recognize these imperfections and be able to adjust prescriptive decisions in accordance with a changed knowledge and perspective of the situations to which those decisions relate. The practical demands on the time and efforts of the court system require that there be a large degree of certainty and that "hard," mechanical reasoning work efficiently. On occasion, however, the practical requirement that courts serve society as it is today requires flexibility as to that certainty and the mechanics of its application. To recognize a need for flexibility in the tools of law on these occasions does not require that all law become questionable. It is only when the effect of law causes a social disruption as evidenced by a serious controversy in regard to fundamental change that reexamination need occur. Courts are dependent in this way on the social action which brings an issue into controversy since they cannot adopt a cautious stance for every minute outcry against the status quo.

I have approached the different matters considered with a view toward their operation, use, influence, and effect. This was to compen-

[91] *Id.* at 112–13.

[92] Dewey, *supra* note 56, at 26.

sate for what can be called the ontological presumption inherent in definitions of what something *is*. In order to remain critical, I did not begin the examination by removing from the problem what I think is known. There is also a tendency in definition of matters to introduce one's own value judgments into what appears as a structural description. Reason was described as a persuasive aspect of argument and as a tool for resolving legal problems, not as a thing or as a property somehow more valuable than emotion.

The different descriptive terminology used to change the perspective as to the legal questions represents an eclectic gathering of information from other disciplines. My belief is that present discussions of interdisciplinary approaches to law are essentially concerned with the expansion of the perceptions of lawmakers through presentation of the findings from other established methodologies. In this way, legal methods can become more incisive and thereby more effective in achieving the unique goals of law.

In considering abortion and obscenity, I assumed that courts may properly decide these matters on their merits. In the context of substantial social controversy, I cannot find any justification for allowing such legislative acts to stand if they have no rational basis in the needs of the people as a whole. This rational basis is the only clear distinction between our law and that of the Nazi government of Germany. The court system also provides the only forum for reasoned testing of this rationality since a legislature must hold with the majority view. Where a significant number of people perceive a particular law as oppressive and unfair, failure to seriously consider their grievances is detrimental to a society ordered primarily through respect for law and to the ultimate legitimacy of law itself.

The law, peculiarly among disciplines, seeks legitimacy through realization of the basic and therefore universal needs of individuals living in a fluid yet cohesive group; it is only through reason that basic needs, which in the societal aggregate give rise to the collective will, can be distinguished from superficial interests.